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No. 04-1506

In The Supreme Court of the United States

ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

vs.

HEIDI AHLBORN,

Respondent.

CORRECTED COPY

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether 42 U.S.C. §1396p(a)(1) permits a state Medicaid program to appropriate a recipient's monetary recovery on a claim arising out of personal injury beyond the extent to which it represents compensation for past medical expenses.

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STATEMENT OF THE CASE

Due to a motor vehicle accident, Heidi Ahlborn, then nineteen years of age, sustained serious and disabling personal injuries, especially to her head, resulting in extensive medical treatment and permanent disability. Subsequently, she was determined to be eligible for Medicaid benefits which were then provided by the Arkansas Department of Human Services, the state agency responsible for the administration of the Medicaid program. Arkansas law specified that Ahlborn automatically assigned to the Arkansas Department of Human Services her "right to any settlement, judgment, or award" she might receive from responsible third parties "to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant." Ark. Code Ann. §20-77-307(a). J.A. 22, 46, 47, 48.

Ahlborn brought suit against two alleged tortfeasors and made a claim against her underinsured motorist carrier. After protracted litigation, the tort claims were settled for a total of $525,000.00. The underinsured motorist carrier paid its limits of $25,000.00, making a total recovery of $550,000.00. J.A. 18. The Arkansas Department of Human Services asserted its lien in the amount of $215,645.30, for which it claimed a right of reimbursement in full. J.A. 12.

A controversy developed between Ahlborn and the state agency as to the permissible extent of the state's right of recoupment. It was stipulated by the DHS that absent any considerations of liability, Ahlborn's cause of action was reasonably estimated at $3,040,708.12 and that the proceeds of the compromise settlement represented

approximately 16.5% of the estimated value of her total damages. J.A. 5, 18.

Ahlborn filed a declaratory judgment action in the District Court contending that 42 U.S.C. §1396p(a)(1) (commonly referred to as the anti-lien statute), prohibits the imposition of a lien "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan[.]", thereby limiting DHS's statutory right of reimbursement to that portion of the lump-sum settlement which fairly represented the past medical expense component of the recovery. J.A. 5-6. It was stipulated by DHS that if Ahlborn was correct, that the DHS lien would be limited to recovering $35,581.47, the amount of the percentage fairly attributable to the past medical expense portion of her claim. J.A. 18.

Both parties filed motions for summary judgment. Pet. App. 16. DHS contended that there was no conflict with the anti-lien statute since under the automatic statutory assignment, Ahlborn's entire claim did not become her property until the Medicaid lien was satisfied. Pet. App. 22.

The District Court granted DHS's motion for summary judgment. Pet. App. 31. The District Court held that the anti-lien statute was not violated because Ahlborn had automatically assigned her right to payment from third parties and any funds she received were not her property. Pet. App. 28-29. The Eighth Circuit Court of Appeals reversed holding that monies received by Ahlborn which were not reimbursements for medical expenses paid were

her property and protected by the anti-lien statute. Pet. App. 14, 15.

SUMMARY OF THE ARGUMENT

42 U.S.C. §1396p(a)(1) prohibits the imposition of a lien "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan[.]" This statute, commonly referred to as the "anti-lien" statute, prevented Arkansas' statutory right of reimbursement except for that portion of the lump-sum settlement which fairly represented the past medical expense component of a tort recovery.

Under both state and federal law, Ahlborn's cause of action against the parties responsible for her injuries constitutes "property". Although Arkansas had enacted a law which automatically assigned to DHS all portions of a Medicaid recipient's recovery, the supremacy clause prohibits its application to the extent that it attempts to acquire monies received by the Medicaid recipient in excess of those amounts recovered for medical care or treatment.

Ahlborn's cause of action consisted of much more than a recovery of medical expenses. Her cause of action included loss of earnings and earning capacity, pain, suffering and permanent impairment of the ability to earn in the future. It was stipulated by DHS that absent any consideration of liability, a reasonable estimation of Ahlborn's damages would be $3,040,708.12. It was further stipulated by DHS that $35,581.47 is a fair representation of the percentage of the total settlement constituting

payment by the tortfeasor for past medical care. Under the "anti-lien" statute, that is the amount that the state is limited to recovering from Ahlborn's settlement.

DHS recognizes that the "anti-lien" statute would prohibit Medicaid from seeking reimbursement for medical costs paid by the program regardless of the amount of money that a Medicaid beneficiary received from any outside source with the exception of those costs which were incurred due to the fault of a liable third party. Even if a recipient were to inherit large sums of money or win the lottery, DHS agrees that Medicaid could not seek reimbursement for medical expenses already paid because such recovery would be prohibited by the anti-lien statute. It would be incongruous for Congress to prohibit the recovery of medical expenses paid by Medicaid out of lottery winnings but allow recovery of amounts paid for a recipient's permanent disability.

The state contends that there is no conflict with the anti-lien statute concerning recoveries from third parties because under the automatic assignment statute, the money remained the property of the tortfeasor until the state was fully reimbursed for all funds expended for Ahlborn's medical care. The automatic assignment statute states, "the assignment shall be considered a statutory lien on any settlement, judgment or award *received by recipient from a third party*". Ark. Code Ann. §20-77-307(c). (emphasis added). This language presumes that Ahlborn receives the property before it is assigned. The assignment statute seeks to relieve Ahlborn of her property and clearly violates the anti-lien provision. Without the anti-lien statute, there would be no prohibition on the state from imposing such an assignment on any Medicaid

recipient whether receiving property from a liable third party or a wealthy aunt.

The federal anti-lien statute does not conflict with other federal Medicare statutes which require the states to acquire reimbursements from third parties and assign to the states damages paid from third parties.

42 U.S.C. §1396a(a)(25)(H) provides:

A State plan for medical assistance must –

. . .

(25) provide –

. . .

(H) that to the extent that payment has been made under the State plan for medical assistance in any case where *a third party has a legal liability to make payment for such assistance*, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual *to payment by any other party for such health care items or services.* (emphasis added)

42 U.S.C. §1396k(a)(1)(A) provides:

(a) For the purpose of assisting in the collection of medical support payments . . . a State plan for medical assistance shall –

(1) provide that, as a condition of eligibility for medical assistance . . . to an individual . . . the individual is required –

> (A) to assign the State any rights . . . *to payment for medical care from any third party* . . .

These statutes only require the State to recover those portions of payments made for medical expenses. Under 42 U.S.C. §1396a(a)(25)(H), the State only acquires the right of the beneficiary "to payment by any other party for such health care items or services." 42 U.S.C. §1396k(a)(1)(A) limits the beneficiary's assignment of rights to the State "to payment for medical care from any third party". Any state law which exceeds these boundaries is preempted by the federal anti-lien statute.

Although there have been opinions by the Department of Human Services that allow the states to recover from beneficiaries more than those amounts tortfeasors paid for medical care, they are not entitled to *Chevron* deference because the anti-lien statute is not ambiguous. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). All three federal statutes limit the recovery of the state to payments for medical care. The anti-lien statute cannot be more direct in its meaning and there is no necessity for an agency determination.

Because the anti-lien statute is unambiguous, there is no need to examine the legislative history of the act in an attempt to determine Congressional intent. An unambiguous statute needs no such examination. Congressional intent on protecting the property of Medicaid beneficiaries has been long standing. While it may be that Congress could not consider every eventuality under which the anti-lien statute might operate, its wording of the statute was absolute.

The state retains its ability to recover its costs expended from liable third-party tortfeasors. Neither the anti-lien statute nor any of the other federal statutes prohibit the state from pursuing its cause of action independently. Even though the anti-lien statute applies in a narrow area, should the enforcement of its provisions prove overly burdensome to Medicaid, Congress can always change the terms of all three applicable statutes as it wishes.

ARGUMENT

I. Ahlborn's Cause of Action Against the Parties Responsible For Her Injuries And Damages Constituted "Property"

Ahlborn contends that the federal anti-lien statute, 42 U.S.C. §1396p(a)(1) prohibits (with certain exceptions not applicable here) the imposition of a lien "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan[.]" The first consideration therefore must be whether Ahlborn's claim for personal injuries, and any recovery for those injuries, constituted property. In Arkansas, "it is basic property law that a chosen action is personal property. The right to sue for damages is property." *Gregory v. Colvin*, 235 Ark. 1007, 1008, 363 S.W.2d 539-540 (1963). This Court has further recognized that a vested cause of action is property. *Pritchard v. Norton*, 106 U.S. 124-132, 1 S.Ct. 102 (1882), *Gibbes v. Zimmerman*, et al., 290 U.S. 326-331 (1933). Federal Medicaid regulations define property as "the homestead and all other personal and real property in which the recipient has a legal interest." 42 C.F.R. §433.36(b). Ahlborn's cause of action against

the tortfeasors responsible for her injuries and damages was therefore personal property in which she had a legal interest.

Ahlborn's cause of action was stipulated to encompass various elements of damage which are generally recognized by most jurisdictions. In Arkansas, they include pain and suffering and permanent disability including loss of earnings and loss of earning capacity. These elements of damage have commonly been referred to as a "bundle of sticks". *United States v. Craft*, 535 U.S. 274, 278 (2002).

The State stipulated that Ahlborn's cause of action less any considerations of liability had a value of $3,040,707.12. J.A. 18-19. The parties further agreed that of the $550,000.00 recovered, $35,581.47 represented the recovery for past medical expenses. Therefore, should Ahlborn prevail on the issue of statutory construction, Medicaid's reimbursement would be limited to $35,581.47. Should the State prevail on the issue of statutory construction, Medicaid would be reimbursed for the full amount of medical expenses paid in the amount of $215,645.30. *Id.*

II. Other Federal Statutes Do Not Conflict With The Anti-Lien Statute

42 U.S.C. §1396p(a)(1) provides that Ahlborn's property may not have a lien imposed upon it because of her receipt of Medicaid benefits. Is there an exception created by federal law for the State to attach a lien to Ahlborn's property?

The Medicaid program was established in 1965 in order to help states reimburse cause of medical treatment

for individuals who came within the poverty guidelines. The program was created by Title XIX of the Social Security Act modified at 42 U.S.C. §1396-13396v.

As a condition for participating in the Medicaid program, Congress enacted statutes requiring the states to attempt recovery of Medicaid funds against the parties responsible for the beneficiary's injuries necessitating the medical treatment.

42 U.S.C. §1396a(a)(25)(H) provides:

> A State plan for medical assistance must –
>
> . . .
>
> (25) provide –
>
> . . .
>
> (H) that to the extent that payment has been made under the State plan for medical assistance in any case where *a third party has a legal liability to make payment for such assistance*, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual *to payment by any other party for such health care items or services.* (emphasis added).

The second statute, 42 U.S.C. §1396k(a)(1)(A) states:

> (a) For the purpose of assisting in the collection of medical support payments . . . a State plan for medical assistance shall –

> (1) provide that, as a condition of eligibility for medical assistance . . . to an individual . . . the individual is required –
>
> (A) to assign the State any rights . . . *to payment for medical care from any third party;*
>
> . . .
>
> (C) to cooperate with the State in identifying and providing information to assist the State in pursuing any third party *who may be liable to pay for care and services available under the plan* . . . (emphasis added)

These two statutes allow the states to recoup money expended for the medical care of the Medicaid beneficiary. The issue presented by this case is the extent to which Congress allowed reimbursement, either from the beneficiary or a responsible third party in cases where the recovery was less than adequate to fully reimburse the state and compensate the beneficiary for the other elements of damage beyond past medical expenses. Obviously, when there has been a recovery which fully compensates the State and the Medicaid beneficiary, there is no problem.

The Amicus brief filed by the Solicitor General of the United States is rife with suggestions that Ahlborn's failure to place the Arkansas Department of Human Services on notice of a proposed settlement with the tortfeasor prejudiced the Department's position with regard to its lien. Solicitor General's Brief, 9, 14, 15, 21 and 22. Such notice would have accomplished no purpose. The Arkansas Attorney General recognizes that the State is powerless to stop a beneficiary from settling her case. Pet. Brief, 33. While there are insufficient funds to compensate

both Ahlborn and the Arkansas Department of Human Services, there has always been an agreement by the parties to hold out of the total recovery of $550,000.00 sufficient funds to satisfy in full the lien of the Department of Human Services in the amount of $215,645.30 should the Department prevail on its argument before this Court. Such lack of notification in this case is of no consequence.

It is further alleged by the Solicitor General that Ahlborn manipulated the percentage that her medical expenses bore to the total amount of recovery. Solicitor General's Brief, 13, 23. The total value of Ahlborn's claim and the medical expense percentage were stipulated by the Arkansas Department of Human Services. J.A. 18-19.

It is Ahlborn's contention that the emphasized statutory phrases above are the only exceptions to the anti-lien statute in which the State may seek reimbursement from either Ahlborn herself or from a third party. All other attempts at reimbursement are pre-empted.

Ahlborn contends that the emphasized language in both statutes limits the State's recovery to only those amounts recovered for her medical care and that the anti-lien statute prohibits the State from recovering funds which were paid for Ahlborn's other elements of damages. In a very well-reasoned opinion by the Eighth Circuit Court of Appeals, the statutory construction limited the State's recovery. The Court stated:

> We believe a straightforward interpretation of the text of these statutes demonstrates that the federal statutory scheme requires only that the State recover payments from third parties to the extent of their legal liability to compensate the

> beneficiary *for medical care and services* incurred by the beneficiary. Under §1396a(a)(25)(H), a state Medicaid plan must include provisions specifying that, when the State provides medical benefits to an applicant, "the State is considered to have acquired the rights of such individual to *payment by any other party for such health care items or services*." (emphasis added). This acquisition of rights occurs only in cases where "a third party has a legal liability to make payment for [medical] assistance." *Id.* Section 1396k(a)(1)(A) similarly requires that an applicant assign to the State her right "*to payment for medical care* from any third party." (emphasis added). Both statutes are thus limited to rights to third-party payments made to compensate for medical care. Pet. App. 9-10.

The Eighth Circuit's opinion approved the finding of the Supreme Court of Minnesota in *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002), *cert. denied*, 539 U.S. 957 (2003) which recognized that the anti-lien statute protected the property of the Medicaid recipient in the form of her cause of action, but also assigned to the State the right to recover in full from a responsible third party for medical expenses paid. Pet. App. 10.

While there are cases to the contrary of the Eighth Circuit decision and *Martin*, some do not deal directly with the anti-lien statute. *Calvanese v. Calvanese*, 93 N.Y.2d 111, 688 N.Y.S. 2d 479, 710 N.E.2d 1079 (1999), *cert. denied*, 528 U.S. 928 (1999); *Grey Bear v. North Dakota Dept. of Human Serv.*, 202 N.D.139, 651 N.W.2d 611 (2002), *cert. denied*, 539 U.S. 960 (2003). Others give only superficial consideration to the anti-lien statute. *Houghton v. Department of Health*, 202 Ut. 101, 57 P.3d 1067 (2002), *cert. denied*, 538 U.S. 945 (2003).

Ahlborn submits that *Martin* and the Eighth Circuit opinion constitute the better rule of law on the issue presented. Congress did not intend for the State's assignment for recovery purposes to delve into the beneficiary's recovery for damages in excess of past medical expenses paid. To do so would countenance placing a lien on the beneficiary's property in violation of the anti-lien statute.

III. The Arkansas Statutes Conflict With The Anti-Lien Statute

Arkansas passed two statutes in an attempt to follow Congress' mandate to recover Medicaid expenses paid. The automatic assignment statute provides:

> As a condition of eligibility, every Medicaid applicant shall automatically assign his or her right to any settlement, judgment or award which may be obtained against any third party to the Department of Human Services to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant. (b) The application for Medicaid benefits shall, in itself, constitute an assignment by operation of law. (c) The assignment shall be considered statutory lien on any settlement, judgment, or award received by the recipient from a third party. Ark. Code Ann. §20-77-307.

Ark. Code Ann. §20-77-302(a) provides:

> When an action or claim is brought by a medical assistance recipient or his or her legal representative against a third party who may be liable for injury, disease, disability, or death of a medical assistance recipient, any settlement, judgment, or award obtained is subject to the division's

> claim for reimbursement of the benefits provided to the recipient under the medical assistance program. (b) In the event of judgment or award in a suit or claim against a third party, if the action or claim is prosecuted by the recipient alone, the court or agency shall first order paid from any judgment or award, the reasonable litigation expenses and attorney's fees. After the payment of these expenses and attorney's fees, the court or agency shall order that the Department of Human Services receive an amount sufficient to reimburse the department the full amount of benefits paid on behalf of the recipient under the medical assistance program. The remainder shall be awarded to the medical assistance recipient.

These statutes do not limit the amount of the State's recovery to that portion covered for the Medicaid beneficiary's medical expenses. To the extent that they allow recovery beyond that amount, they are pre-empted by the anti-lien statute and are therefore invalid.

By its language, Ark. Code Ann. §20-77-307(c) creates the lien after the Medicaid recipient receives the "settlement, judgment, or award" from a third party. The State argues that the recovery remained the property of the tortfeasor and never became Ahlborn's property. The statutory language indicates that the recovery has become Ahlborn's property before the lien attaches placing it in clear violation of the anti-lien statute:

> "(c) The assignment shall be considered a statutory lien on any settlement, judgment, or award *received* by the recipient from a third party." *Id.* (emphasis added)

The State cannot accomplish indirectly by what it cannot do directly. Congress did not intend that the State

could accomplish by statutory assignment what it could not accomplish by placing a lien on the property of the beneficiary. The Arkansas statutes were enacted without Congressional authority and create an exception to Congressional directives. If Congress had intended the assignment to be an exception to the anti-lien law, it could have so stated as incongruous as that may have been. As the Eighth Circuit pointed out:

> We do not believe, moreover, that the State may circumvent the restrictions of the federal anti-lien statute simply by requiring an applicant for Medicaid benefits to assign property rights to the State before the applicant liquidates the property to a sum certain. If the State could proceed in that manner, then we do not see what limiting principal would preclude the State from requiring a Medicaid applicant to assign to the State other interests and property – such as future wages, lottery winnings, or real property – in order to reimburse the State for health care expenditures under Medicaid. This sort of broad ranging assignment requirement clearly would conflict with the federal anti-lien statute. Pet. App. 6-7.

IV. The Anti-Lien Statute Is Unambiguous

It has been argued that the legislative history of the anti-lien statute suggests that third party recoveries were not in contemplation of Congress when the act was passed. The statute is unambiguous and specifically covers all of Medicaid beneficiary's property and not merely housing. Had Congress chosen to exclude property other than houses, it could have so stated. The Amicus brief by the Attorney General of the State of Washington urges the

Court to examine the legislative tea leaves in order to reach a conclusion other than that clearly stated by the Congress. It is unnecessary to resort to clairvoyant attempts to read the mind of Congress when Congress' intent is clearly stated. This Court has recognized that such an attempt carries inherent risks with inexact results. In *Exxon Mobile Corporation v. Allapattah Services, Inc.*, ___ U.S. ___, 125 S.Ct. 2611 (2005), the problem was stated as follows:

> As we have repeatedly held, the authoritative statement is the statutory text. Not legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and the legislative history in particular is vulnerable to serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article 1, may give unrepresentative committee members . . . or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. *Id.* at 2626.

The Congressional intent to protect the property of a recipient from reimbursement is universal. An inconsistent result would be reached by judicial interpretation of the legislative intent to create an exception not contained in the statute. Should Congress decide to change its mind, it can pass new legislation.

V. The HHS Adjudications Are Not Entitled to Deference

This case does not fall within the parameters of judicial deference to administrative statutory interpretation. Such deference only applies where there is an ambiguity. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), when Congress had spoken clearly on the subject, there is no place for an administrative agency to instruct the Court on the meaning of the statute. The business of Courts is statutory interpretation. Agency determinations would be helpful in technical regulatory interpretations in areas of which the Courts are not familiar. The reconciliation of three federal statutes goes beyond the expertise of an agency determination and is properly vested with the Courts. The HHS's determinations at issue have a clear conflict with the plain language of the anti-lien statute.

HHS through opinion letters gave three reasons why states could be required to recover funds in excess of those being paid for past medical care of a beneficiary. In noting that third parties should be responsible for reimbursing the government, HHS argues that states are mandated under 42 U.S.C. §1396a(a)(25)(B) to "seek reimbursement for such assistance to the extent of such legal liability." *Washington State Dep't of Social & Health Services*, DAB

No. 1561 at 8, 1996 WL 157123 (Dep't of Health & Human Services February 7, 1996), Pet. App. 47; *California Dep't. of Health Services*, DAB No. 1504 at 10, 1995 WL 66334 (Dep't of Health & Human Services January 5, 1995), Pet. App. 69. As noted by the Eighth Circuit, the phrase "such legal liability," refers to the legal liability of third parties *"to pay for care and services available under the plan."* Payments made for other than past medical expenses are therefore not authorized. Pet. App. 12.

The Eighth Circuit opinion further disagreed with HHS's contention that Medicaid had superior status to the beneficiary in order to receive reimbursement. The Court reasoned Medicaid beneficiaries are only required to assign their rights to third party payments for medical care and therefore, 42 U.S.C. §1396a(a)(25)(H) and §1396k(a)(1)(A) conflict with HHS's opinions. Pet. App. 12-13.

HHS was concerned that plaintiffs would intentionally manipulate settlement figures to artificially lower amounts recovered for past medical expenses. *Washington State Dep't of Social & Health Services*, DAB No. 1561 at 6, 1996 WL 157123 (Dep't of Health & Human Services February 7, 1996), Pet. App. 55; *California Dep't. of Health Services*, DAB No. 1504 at 8-9, 1995 WL 66334 (Dep't of Health & Human Services January 5, 1995), Pet. App. 85-86. The Eighth Circuit opinion correctly pointed out that in such cases, the State could pursue the third party tortfeasor and the Medicaid beneficiary in the event the figures were artificially manipulated because such monies were actually payments for past medical care even though not so denominated. Pet. App. 13-14.

The HHS's determinations relied upon by the State are not of the type entitled to judicial deference with this

Court's holding in *Christensen v. Harris County*, 529 U.S. 576 (2000) where it was stated:

> Here, however, we confront a interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication, or notice – and – comment rule marking. Interpretations such as these in opinion letters – like interpretations contained in policy statements, agency manuals and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. *Id.* at 587.

CONCLUSION

Ahlborn respectfully requests that the Court affirm the decision of the Eighth Circuit Court of Appeals. Such an affirmance would leave intact the State's ability to recover its costs directly from third party tortfeasors. In the event Congress desires to carve an exception out of the anti-lien statute, it may amend the Act.

Respectfully submitted,

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